IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Abdul Khan & others Vs State of Rajasthan
(1) D.B.CRIMINAL APPEAL NO.895/2003

Beerbal Khan Vs State of Rajasthan
(2) D.B.CRIMINAL APPEAL NO.931/2003

against the judgment dt.25.7.2003
passed by the Sessions Judge, Jaisalmer,
in Sessions Case No.39/2000.

Date of Judgment: May 22,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE MANAK MOHTA

Mr.P.N.Mohanani)
Mr.L.D.Khatri) for appellants.

Mr.V.R.Mehta, Public Prosecutor.
Mr.Pradeep Shah, for complainant.

REPORTABLE/-

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. The appellants "A1" Abdul Khan, "A2" Motan Khan, "A3" Ali Gawar, "A4" Hanif Khan, "A5" Vali Mohd., "A6" Nijawat Khan & "A7" Beerbal Khan were put to trial on

the charge of forming unlawful assembly and in prosecution of the common object committing murder of Kumbha Ram and causing injuries to other prosecution witnesses. The Learned Sessions Judge, Jaisalmer by judgment dated 25th July, 2003 having found the prosecution case proved, held the appellants guilty of offence under Section 302/149 IPC and sentenced each of them to imprisonment for life and to pay a fine of Rs.2000/- and in default, to further undergo six months' rigorous imprisonment. The appellants have further been convicted and sentenced as follows:

(a)	U/s.325/149 IPC (Except Motan Khan)	:	Two years' R.I. and a fine of Ra.500/- and in default, to undergo 3 months' R.I.
(b)	U/s.325 IPC (Motan Khan)	:	Two years' R.I. and a fine of Rs.500/- and in default, to undergo 3 months' R.I.
(c)	U/s.148 IPC	:	Two years' R.I. and a fine of Rs.500/- and in default, to undergo 3 months' R.I.
(d)	U/s.323/149 IPC	:	Six months' R.I.
(e)	U/s.447 IPC	:	Three months' R.I.

2. The factual scenario as emerged during the trial is that the appellants and the prosecution witnesses are the allottees of land for temporary cultivation in the

colony of Rajasthan Canal Project, District, Jaisalmer. . The appellants who belonged to the Muslim community are the old allottees in the area known as Hariar Minor within the jurisdiction of Nachna Colonisation Tehsil. P.W.1 Raimal by caste Kumhar and his two brothers namely P.W.2 Koja Ram and deceased Kumbha Ram were also allotted a piece of land in Chak No.3 of Hariar Minor. All the three brothers constructed separate huts on the land allotted to P.W.1 Raimal. With the help of deceased Kumbha Ram D.W.1 Chima Ram could also get a nearby Muraba allotted in his favour. It appears that the appellants were not happy with the induction of victim party in the area as allottees. It further appears that at the instance of Kumbha Ram a proceeding under Section 107 Cr.P.C. was initiated against the appellants and their associates by the police. The untowards incident took place on 7.7.2000 in which one Kumbha Ram died and some of the prosecution witnesses sustained injuries on one side and from among the appellants Nijawat Khan was seriously injured. Two F.I.R.s of the incident came to be lodged at Police Station, Nachna, out of which the first was lodged at 2:00 P.M. by the first appellant A1 Abdul Khan stating inter alia that having come to know A6 Nijawat Khan

being seriously injured as a result of thrashing by Koja Ram (P.W.2), Raimal (P.W.1) etc. he rushed to the spot alongwith A2 Motan Khan. They were also thrashed by the prosecution witnesses. He brought the injured A6 Nijawat Khan in a Jeep to the Police Station. On this information, Police registered a case being No.23/2000 for offence under Section 307 I.P.C. Both the injured Nijawat Khan and Motan Khan were sent to the Primary Health Centre at Pokran for medical examination. The Incharge of the Police Station, Nachna along with other police officials reached at the place of incident. P.W.2 Koja Ram gave narration of the incident vide Ex.P2. As per the version of incident given by him, he along with deceased Kumbha Ram, P.W.1 Raimal and Babu Ram with their families were at their place of residence on Chak No.3 HMR. At about 10-11 A.M. his neighbor D.W.1 Chima Ram approached to him. A vehicle carrying slabs and other building material jammed in the sand. There were about 15-20 labourers along with the vehicle. Chima Ram made a request to him to arrange tea for the said 15-20 labourers. Chima Ram could manage to take the vehicle to his Muraba. At that time A1 Abdul Khan, A2 Motan Khan, A4 Hanif Khan, A5 Vali Mohd. A6 Nijawat Khan and other namely Mehrab,

Mohammad Khan, Magan Khan, Suleman Khan and Peer Bux (not chargesheeted) and some more persons arrived on the land of Chima Ram and took up quarrel with him. They mounted assault on them by diverse weapons like Kulhari, lathies etc. In the assault Kumbha Ram died on the spot and number of persons sustained injuries. A1 Abdul Khan took the vehicle to his own Muraba and got the slaps and other building material unloaded. They were threatened not to report the matter to anybody else they may also be killed. Out of fear they did not move from the place of incident. However, they shifted the dead body of Kumbha Ram to the Muraba of P.W.3 Multan Singh. The police recorded the statement of P.W.2 Koja Ram on the Muraba of Multan Singh. On the basis of said Parch Bayan Ex.P2 police registered a case being No.24/2000 for offence under Sections 302, 147,148, 149. 447 and 323 I.P.C. and proceeded with investigation. After usual investigation police laid charge-sheets in both the F.I.R.s i.e. F.I.R. Case No.23/2000 and 24/2000.

3. The counter version about the incident was given by one of the appellants namely A6 Nijawat Khan in his statement under Section 313 of the Code of Criminal

Procedure. He stated that the deceased Kumbha Ram offered him to collect fodder from his Dhani instead of going elsewhere. Thus, on the date of incident, he had gone to the Dhani of Kumbha Ram for collecting fodder. However, he was pushed inside the hut wherein Kumbha Ram, Chima Ram, Koja Ram, Raimal Ram and other ladies mounted attack on him with intention to kill him. Kumbha Ram and Koja Ram inflicted injuries by giving Kulhari blows. The wives of Raimal Ram and Chima Ram also made assault on him. On account of the said injuries, mandible bone was fractured. He also sustained serious injuries on various parts of the body. He fell down and became unconscious. On gaining consciousness, he found himself admitted in the hospital at Jodhpur. He remained in the hospital at Jodhpur for more than a month for the treatment. The trial court acquitted the accused persons in F.I.R. Case No.23/2000. However, having found the prosecution case proved in F.I.R. Case No.24/2000 convicted and sentenced the appellants in the manner stated above.

4. It is contended by the learned counsel for the appellants that it is not safe to accept the evidence of prosecution witnesses more particularly in the instant

case, as they are partisans and highly interested. It is also submitted that prosecution has not come forward with the whole truth and that the origin of occurrence has been suppressed inasmuch as injuries to some of the accused persons have not been explained and consequently it must be held that occurrence did not take place in the manner alleged by the prosecution and under these circumstances the truth from falsehood cannot be separated and, therefore, none of the appellants could be convicted. On the other hand it is submitted by the learned Public Prosecutor and the learned counsel by the complainant that the occurrence had taken place in the broad day light in a well planned manner and merely because the witnesses are interested, their evidence cannot be rejected and the view taken by the trial court does not call for interference. It is not in dispute that there has been hostility between the parties. The prosecution witnesses belonged to one fraction. It also appears that the accused and the prosecution witnesses sustained injuries in one and the same incident. It is significant to note that both the parties gave their version soon after the occurrence. Thus, the question arises for consideration in this appeal is as to whether the

incident had taken place in the manner alleged. It is also to be considered whether the case set up by the defence is acceptable. In view of the peculiar features of the case, we are required to appreciate the evidence of eye witnesses with great caution.

5. The prosecution examined 23 witnesses out of which P.W.1 Raimal, P.W.2 Koja Ram, P.W.6 Miss Santosh and P.W.13 Mohini are the injured eye witnesses. Whereas P.W.1 Raimal and P.W.2 Koja Ram are the brothers of the deceased Kumbha Ram, P.W.6 Miss Santosh is the minor daughter and P.W.13 Mohini the wife. P.W.2 Koja Ram deposed that all the three brothers were allottees of different Murabas in Chak No.3 Hariar Minor. All the three brothers constructed separate huts on his Muraba. All the three lived in the huts with their familes. D.W.1 Chima Ram was his neighbor. On the date of incident at about 9-10 A.M. they were ploughing the land. The tractor was being driven by Babu Ram. All the three brothers with their families were sitting outside the huts. At that time Chima Ram arrived and requested them for arranging tea. He stated that the vehicle carrying slabs and other building material had jammed in the sand. He was to

provide tea to the labourers. At that time some people in tractor and jeep arrived, which included A1 Abdul Khan, A2 Motan Khan, A3 Ali Gawar, A6 Nijawat, A7 Beerbal. They took up quarrel with Chima Ram and the people on the vehicle carrying slabs. They asked them not to unload the material on the Muraba as there was a stay order in their favour. D.W.1 Chima Ram and his companions P.W.23 Ramu Ram, P.W.4 Chena Ram and about 4-5 persons ran away and took shelter in the Dhani of deceased Kumbha Ram. Appellant Abdul Khan took the vehicle to his field and got the material unloaded. Some more about 15-20 persons joined them. After certain deliberation A7 Beerbal Khan arrived at the hut of Kumbha Ram and gave a call to Chima Ram and Kumbha Ram. He asked them to come out for settlement of the dispute. Kumbha Ram declined to come out of the hut. A7 Beerbal returned back to A1 Abdul Khan. After some time the mob surrounded the hut of Kumbha Ram. A1 Abdul Khan was carrying lathi, Ali Gawar and Hanif Khan Kassi, Beerbal Jayee, Motan Khan, Vali Mohammad and Nijawat Khan lathies in their hands. Magan Khan, Jamal Khan and Peer Bux were also carrying lathies in their hands. There were about 40-50 persons. The quarrel ensued. D.W.1 Chima Ram, who

was standing outside the hut of Kumbha Ram returned to his Muraba. A1 Abdul Khan gave a call to Kumbha Ram to come out. Kumbha Ram came out from the hut and pleaded mercy. As soon as he bent down to touch the feet of Abdul Khan, he (Abdul Khan) gave a lathi blow on his head as a result of which Kumbha Ram fell down. All the other accused persons with diverse weapons in their hands also thrashed Kumbha Ram. On intervention, P.W.1 Raimal Ram, P.W.13 Mst. Mohini the wife of Kumbha Ram and P.W.6 Miss Santosh the minor daughter of Kumbha Ram, were also thrashed. He was being assaulted by A2 Motan Khan. He sustained injuries on the back and hand. Raimal Ram sustained injuries on his legs. Driver and other witnesses ran away from the place of incident. Abdul Khan and the other accused persons left the place of incident after giving a threat of life on disclosing the incident to any one. On their departure, they entered in the hut. Kumbha Ram had died. The dead body of Kumbha Ram was taken to the Muraba of Multan Singh on a camel cart. He also stated that all the accused persons arrived on his land after forming an unlawful assembly. They were unhappy with him for getting land allotted to an outsider. He also gave other details of the

investigation. The statements of P.W.1 Raimal Ram, P.W.6 Santosh and P.W.13 Mohini Devi are almost on the same line.

6. P.W.3 Multan Singh is the neighbor of deceased Kumbha Ram. He stated that Abdul Khan was unhappy with the allotment of land in the colonisation area to Kumbha Ram, Koja Ram, Raimal and Chima Ram. He also stated that a preventive proceeding under Section 107 Cr.P.C. was taken against the appellants at the instance of Kumbha Ram. He also stated that on the date of incident at about 10-11 Om Prakash son of Koja Ram approached to him and informed that the persons of Muslim community of Village Hariar had surrounded their hut. He immediately rushed to the place of incident. He found the vehicle of A1 Abdul Khan parked. Abdul Khan was standing near the vehicle along with Motan Khan, Ali Gawar, Hanif Khan, Jamal Khan etc. and getting the slabs unloaded from the vehicle. Abdul Khan questioned him as to why outsiders are getting the land allotted in their area. He also stated that he had obtained a stay order with respect to allotment of the Muraba in question. He also stated that he wanted to get the dispute settled. He also stated that the

people were sitting in 2-3 groups. Beerbal Khan exhorted Abdul Khan to move towards the field of Kumbha Ram. After some time he heard the cries from the field of Kumbha Ram. He returned to his Dhani. After some time he went to the place of incident and found Koja Ram, Raimal and his family members were lying in injured condition. The dead body of Kumbha Ram was brought to his field on a camel cart. They were not having any means with them to reach Police Station for reporting the crime. However, at about 5:00 P.M. Police arrived and inquired about the incident.

7. P.W.4 Chena Ram is the neighbor of Chima Ram. He stated that Chima had brought the slabs and other building material in a vehicle. While he had got only 9-10 slabs unloaded, about 10-12 persons of Muslim community arrived and asked him to stop. Thereafter they moved towards the field of Kumbha Ram. He had heard the cries of ladies and children from the field of Kumbha Ram.

8. P.W.5 Sumer Ram also stated that while D.W.1 Chima was getting the truck unloaded about 8-9 persons of Muslim community arrived and asked not to

get the material unload on his Muraba. Chima Ram moved to the field of Kumbha Ram. A quarrel took place outside the hut of Kumbha Ram. Before the incident took place Kumbha Ram asked him to bring his diary. In the diary Ex.P17 he recorded the names of the assailants. The other witnesses P.W.9 Samsudin, P.W.10 Lala Ram, P.W.11 Ishaq Khan and P.W.23 Ramu Ram have not supported the prosecution case, as such they were declared hostile.

9. The prosecution did not produce Chima Ram. The defence produced him as D.W.1. He stated that on the date of incident he had brought the slabs and other construction material in a vehicle. While he was getting the material unloaded some of the appellants approached to him and informed him about the stay order of the court. On their request he stopped the unloading of the material. After some time Abdul Khan, Nijawat Khan, Beerbal Khan proceeded towards the Dhani of Kumbha Ram. A quarrel took place on the Dhani of Kumbha Ram in which A6 Nijawat was seriously injured. Nijawat was immediately taken in a vehicle to the Police Station and then to the hospital.

10. P.W.20 Suresh Kumar is the Patwari. He deposed that in Chak No.3 Hariar Minor in special allotment 18.18 Bighas of land in Muraba No.186/43 was allotted to P.W.1 Raimal Ram. The possession of the land was given on 30.6.99. On the said Muraba all the three brothers separately constructed their huts. He submitted a report in that regard as Ex.P41 along with the trace map Ex.P42 to the police.

11. P.W.21 Ishwar Singh A.S.I. Posted at Police Station, Nachna stated that after registering the case No.23/2000 he proceeded to the place of incident and recorded the statement of injured P.W.2 Koja Ram vide Ex.P2. P.W.22 Prem Singh the Incharge, Police Station, Nachna deposed that he inspected the site on 8.7.2000. He has given the details of investigation. He collected the blood smear soil from inside hut of Kumbha Ram vide Ex.P6. He also collected blood smear soil and controlled soil from outside the hut vide Ex.P7. Certain articles including the weapons of offence were collected vide Ex.P8, Ex.P9, Ex.P10 and Ex.P11. He prepared the inquest report vide Ex.P13. He has also given details of arrest of the accused appellants and the recovery of weapons of offence. In pursuance of the information

given by appellant Hanif vide Ex.P50 a blood stained lathi was recovered vide Ex.P25. Similarly a blood stained lathi was recovered from Vali Mohammad vide Ex.P26 in pursuance of the information given by him vide Ex.P51. Appellant Beerbal Khan gave information vide Ex.P52 which led to recovery of blood stained lathi vide Ex.P27. Further 9 bundles of wire were recovered from Ali Gavar vide Ex.P54 in pursuance of the information given by him vide Ex.P53. The motbirs of different memos namely P.W.9 Samsudin, P.W.10 Lala Ram and P.W.11 Ishaq Khan did not support the recoveries and as such they were declared hostile. The prosecution also produced witnesses of link evidence to show that the articles which were sealed and seized on the spot and till they reached to the Forensic Science Laboratory remained intact. It is not necessary to deal with the link evidence as the same has not been challenged. As per the FSL report Ex.P45 all the articles recovered have been found to be stained with human blood.

12. We may at this stage refer to the injuries sustained by deceased Kumbha Ram and the prosecution witnesses on one side and the injuries

sustained by the appellant A6 Nijawat Khan for determining as to how the incident took place. A medical board consisting of P.W.12 Dr.S.L.Jangid, P.W.14 Dr.Shantilal and P.W.17 Dr.Dinesh Sharma conducted autopsy on the dead body of Kumbha Ram vide Ex.P30 and noticed the following injuries:-

1. Fracture of right ramus of mandible;

2. Lacerated wound on upper fronto parietal region at mid part vertically oblique 6cm x 3cm x bone deep with fracture of underlying frontal and right parietal bone in multiple fragments, with laceration of brain matter and membranes of fronto right parietal area 5cm x 4m x 3cm cranial cavity full of fluid blood;

3. Lacerated wound 3cm x 2cm x scalp deep on occipital region.

All the injuries were reported to be ante mortem in nature, caused by blunt object. The Board opined that cause of death was extensive laceration of brain and associated intracranial haemorrhage.

13. PW 14 Dr.Shantilal examined the injuries of other injured persons. He examined the following injury on the person of PW 6 Ms Santosh vide Ex.P.31:-

1. Lacerated wound 5 x 2 x 1/2cm on the centre of scalp.

The injury was found to be simple in nature caused

by blunt object.

14. The doctor examined Smt.Paru Devi w/o Koja Ram vide Ex.P.32 but no mark of injury was found on her person.

15. The doctor examined following injuries on the person of PW 13 Mohini Devi vide Ex.P.33:-

1. Lacerated wound 3 x 1 x 1/2cm on the centre of scalp

2. Contusion 5 x 5cm on the back of right leg.

Both injuries were found to be simple in nature, caused by blunt object.

16. The doctor also examined following injuries on the person of PW 2 Koja Ram vide Ex.P.34:-

1. Lacerated wound 3 x 2 x 1/4cm on the upper part of occipital region.

2. Pain, swelling on whole back of right hand.

The first injury was found to be simply caused by blunt object. The second injury i.e. swelling on whole back of right hand, on radiological examination, was found to be grievous in nature.

17. The doctor noticed the following injuries on the

person of PW 1 Raimal vide Ex.P.35:

> "1. Lacerated wound 7 x 1 x 1/2cm on the centre of scalp;
>
> 2. Pain & swelling all around the left wrist join and back of hand;
>
> 3. Pain & swelling around the right wrist joint & back of hand;
>
> 4. Swelling and pain around the left knee and 3/4th of leg;
>
> 5. Lacerated wound ¼ x 1/4cm skin deep on 2nd phalynx of right middle finger posteriorly (back).

18. DW 1 Chima Ram was examined vide Ex.P.36. No mark of injury was found on his person.

19. The injuries of A6 Nijawat Khan were examined vide Ex.D.6A, which read as follows:

> 1. Incised wound 4 x 2 x bone deep with compound fracture of underlying mandible bone – on right side of chin (vertically oblique towards Rt.);
>
> 2. Complete dislocation of teeth 1,2,3,4 & missing sockets of the teeth lacerated;
>
> 3. Incised wound 01cm long cut of lower lip – just above the Inj.No.1 (through & through cut) Rt.side (vertically oblique);
>
> 4. Lacerated wound 3 x 2 x bone deep with compound fracture of nasal bone (Antero-post);
>
> 5. Incised wound 4 x 2 x 1/4cm on the Left side of

forehead;

6. Superficial burn 15 x 14cm on left buttock;

7. Superficial burn on the back of whole left ring finger & skin over the metacarpal bone of the left ring finger (Blisters, blackening & peeling of skin of all burns).

20. Another injury report placed on record is Ex.D.7, which also pertains to A6 Nijawat Khan. According to D.W.2 Dr.N.Bhargava, A6 Nijawat Khan was shifted to the hospital at Jodhpur, where he remained during the period 7.7.2000 to 26.7.2000.

21. On consideration of the entire evidence the following important facts emerged:

(1) There existed hostility between the appellants and the prosecution witnesses on account of recent allotment of Murabas in the Canal Colony Area of Hariar Minor.

(2) The occurrence took place on the Muraba of P.W.1 Raimal Ram inside and outside the hut of deceased Kumbha Ram.

(3) The prosecution case of causing fatal injuries by A1 Abdul Khan to the deceased

Kumbha Ram finds corroboration from the medical evidence and other incriminating circumstances.

(4) The incident took place inside and outside the hut of Kumbha Ram. The State initiated two prosecution cases by filing charge-sheets in F.I.R. Case No.23/2000 and 24/2000.

(5) The prosecution witnesses in the instant case and accused in F.I.R. Case No.23/2000 have been acquitted of charge under Section 307, 307/149 I.P.C. by the court of Sessions Judge, Jaisalmer. However, the defence version in the instant case i.e. F.I.R. Case No.23/2000 has appeared at the earliest in F.I.R. Case No.23/2000. The prosecution did not produce the material witness like Chima Ram. However, he was produced by the defence as D.W.1. He deposed that oral altercation took place in which the appellant A6 Nijawat Khan sustained severe injuries. He also deposed that he immediately left the place and after some time when he returned,

found Kumbha Ram dead. He was told that Kumbha Ram was murdered by A1 Abdul Khan and others. It shows that a free fight took place on the Muraba of P.W.1 Raimal Ram in which on the prosecution side Kumbha Ram died and from the side of accused persons Nijawat Khan sustained severe injuries. The other prosecution witnesses suffered minor injuries.

(6) All the eye witnesses are consistent in their deposition that after the deceased Kumbha Ram was assaulted by A1 Abdul Khan. After had fallen down the other appellants thrashed him by diverse weapons. But the medical evidence shows only three injuries on the person of the deceased. In view of the ocular evidence, we expected many more severe injuries. This shows that prosecution witnesses have not only exaggerated the incident but have also suppressed the genesis of the incident.

(7) The injuries on the person of A6 Nijawat

Khan are severe in nature. From the date of incident i.e. 7th July, 2000 to 18th July, 2000 he was not in a condition to speak. He remained in hospital under treatment for long. He was arrested on 28.8.2000 on being cured. The prosecution has failed to explain the injuries on his person.

22. The question that arises for consideration is whether in view of the facts indicated above, can it be said that the incident had exactly taken place in the manner the prosecution witnesses of the occurrence have deposed and as such the appellants are guilty of offence under Section 302/149 I.P.C. or it was a case of free fight in which only the persons, who directly participated are responsible to the extent the part played by them or the appellants have acted in right of private defence or exceeded the right of private defence? Clue to the material question i.e. the effect non-explanation of the injuries on the person of A6 Nijawat Khan can be traced from various decisions of the Apex Court. To begin with the earliest case i.e. in Mohar Rai vs. State of Bihar reported in A.I.R. 1968 SC 1281, it is held therein that in a murder case, the non-

explanation of the injuries sustained by the accused at about the time of the occurrence or in the case of altercation is very important circumstance from which the court can draw the following inferences:

(1) The prosecution has suppressed the genesis and the original of the occurrence and has thus not presented the true version;

(2) The witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

23. In Bhagwan Tana Patil vs. State of Maharashtra reported in 1974 SCC(Cri) 11 on the effect of non-explanation of injuries on the person of the accused, the Court observed:

> "True that the explanation given was not found impeccable but there is no hard and fast rule that simply because the prosecution witnesses did not explain the injuries on the person of the accused, their entire evidence should be discarded."

24. In Onkarnath Singh vs. State of U.P. Reported in 1974 SCC(Cri) 884, the Apex Court dealing with the identical contention observed:-

> "Such non-explanation, however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses, and the court will scrutinise their evidence with care. Each case presents its own features. In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsify the substratum of its story, while in others it may have little or no adverse effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set up by the accused. But it cannot be laid down as an invariable proposition of law of universal application that as soon as it is found that accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of private defence would stand prima facie established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises."

25. In Lakshmi Singh vs. State of Bihar reported in 1976 SCC(Cri) 671 the accused sustained injuries in the same occurrence. No independent witness was examined by the prosecution to support the

participation of the appellant in the assault. It was also found that the evidence of the witnesses of occurrence showed that they gave graphic description of the assault with regard to the order, the manner and the parts of the body with absolute consistency which gave an impression that they had given a parrot like version acting under a conspiracy to depose to one set of facts and one set of facts only. In view of the nature of evidence of the witnesses of the occurrence the Apex Court accepted the contention advanced on behalf of the accused, particularly taking the entire picture of the narrative given by the witnesses, that they had combined together to implicate the accused falsely because of long standing litigation between them and the said witnesses. Thereafter, the Court considered the injuries that were inflicted on the person of the accused Dashrath Singh and laid down that where the prosecution fails to explain the injuries on the accused, two results follow:-

(1) That the evidence of the prosecution witness is untrue; and

(2) The injuries probablise the plea taken by the appellants.

Thus in Lakshmi Singh's case the earlier decision

of the Apex Court in Mohar Rai's case was followed.

26. In State of Gujarat vs. Bai Fatima reported in 1975 SCC(Cri) 384 dealing with the contention raised as to the injuries sustained by one of the accused, the Court observed as follows:-

> "In material particulars the evidence of the three eye-witnesses as also the evidence of dying declaration of the deceased before P.W Gulamnabi is so convincing and natural that no doubt creeps into it for the failure of the prosecution to explain the injuries on the person of respondent 1. The prosecution case is not shaken at all on that account."

27. In Jagdish vs. State of Rajasthan reported in 1979 SCC(Cri) 436 the Apex Court held that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries, so as to satisfy the court as to the circumstances under which the occurrence originated. However, the Court pointed out following two conditions to be satisfied before this obligation is placed on the prosecution:

> (1) That the injuries on the person of the accused must be very serious and severe and not superficial;

(2) That it must be shown that these injuries must have been caused at the time of the occurrence in question.

28. In Hare Krishna Singh and Ors. vs. State of Bihar reported in 1988 SCC(Cri) 279, the Apex Court having considered all its earlier decisions observed as follows:-

> "Upon a conspectus of the decisions mentioned above, we are of the view that the question as to the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused."

29. A three Judges Bench in Vijayee Singh & Ors. vs.

State of U.P. Reported in 1990 SCC(Cri) 378 explained its earlier judgments in Mohar Rai and Lakshmi Singh case(supra). In the said case the trial court as well as the two out of three learned Judges accepted the testimony of tow out of three eye witnesses were injured witnesses and the third one had given the report giving all the details. Though they had not explained the injures on two accused persons but their evidence was found to be clear, cogent and convincing, which could not be thrown above board. In the opinion of the Court irrespective of the fact that the said witnesses did not explain the injuries on the person of the two accused persons, the only inference could be drawn is that the accused persons received injuries during the course of occurrence by some of the members of the prosecution party. The Court observed as follows:-

> "Failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case."

30. In State of U.P. vs. Mukunde Singh & Ors. reported in 1994 SCC(Cri) 473, the High Court acquitted the accused respondents having found that the eye-witnesses did not furnish any explanation regarding the injuries found on the accused persons and as such the version given by them cannot be implicitly believed and that the accused acted only in exercise of self defence and were entitled to benefit of the section. The Apex Court considering the evidence of two injured eye-witnesses observed that the High Court ought to have considered that even if the accused persons acted in exercise of self defence, it was further required to be considered whether they exceeded the right of private defence. It was a case where large number of persons were injured and three persons were killed. The injuries on the accused persons were not found to be very serious and many of them had received simple injuries. The Court observed as follows:-

> "No doubt, the trial court was not quite right in simply ignoring the injuries on the accused persons by holding that they might have been self-inflicted. All the injuries on the accused are such which could not have been self-inflicted. But at the same time they are all simple injuries which were not caused by deadly weapons. That being the case, even

> giving benefit to the accused that they had the right of self-defence, we have to necessarily examine whether they have exceeded the same."

31. In the said case, the Apex Court while setting aside the acquittal of some of the accused persons convicted them for offence under Section 304 Part-I I.P.C. and sentenced to 7 years rigorous imprisonment.

32. In Ram Sunder Yadav & Ors. vs. State of Bihar reported in 1998(7) SCC 365, noticing the divergent views expressed in Jagdish vs. State of Raj.(supra) and Hare Krishna Singh vs. State of Bihar(supra) a two Judges Bench of the Apex Court referred the matter to the larger Bench. Hearing the reference a three Judge Bench returned the reference holding that the controversy has been settled by another three Judge Bench in Vijayee Singh vs. State of U.P.(supra).

33. A three Judges Bench in Rajender Singh & Ors. vs. State of Bihar reported in 2000(4) SCC 298 dealing with the question whether non-explanation of the injuries on the accused ipso factor can be held to be fatal to the prosecution case, observed as follows:-

> "It is too well settled that ordinarily the prosecution is not obliged to explain each

> injury on an accused even though the injuries might have been caused in the course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident."

34. The Apex Court in Takhaji Hiraji vs. Thakore Kubersing Chamansing reported in 2001 SCC(Cri) 1070 held that the court ought to **make an effort at searching out the truth on the material available on record with a view to find out how much** of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful and the approach of rejecting the prosecution case in its entirety for non-explanation of the injuries sustained by the accused persons is erroneous. The Court held;

> "It cannot be held as a matter of law or invariably a rule that **whenever the accused** sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injuries on the person of the **accused were of a serious nature**; and (ii) that such injuries must have been

> caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution."

35. In Kashiram vs. State of M.P. reported in 2002(1) SCC 71 a three Judges Bench held that failure to explain injuries on accused sustained in the same incident in which persons belonging to prosecution side suffered injuries, the non-explanation of, by prosecution, by itself not sufficient to discard the prosecution case outrightly.

36. The Apex Court in Laxman Singh vs. Poonam Singh & Ors. reported in 2004(10) SCC 94 held that number of injuries is not always a safe criteria for determining who was the aggressor. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence.

37. Recently, in Vajrapu Sambayya Naidu & Ors. vs. State of A.P. & Ors. reported in 2004(10) SCC 152, three accused persons received injuries in the same incident. The prosecution failed to explain the said injuries. The Apex Court, on facts held:

> "Accused could not be said to be the aggressors, if at all it was the prosecution party which could have attempted to dispossess the accused appellants by use of force."

38. The Court having found the case of defence probable held that though initially the appellants had only right of private defence of property, once the prosecution party started an assault on them with sharp-cutting weapons, that gave rise to the right of private defence of person as well. It was further observed that they must have apprehended that at least grievous injury may be caused to them, if not death. They were certainly entitled to use of reasonable force to resist the members of the prosecution party and their right of private defence extended to cause death of any aggressors if that became necessary.

39. In Triloki Nath & Ors. vs. State of U.P. Reported in 2005(9) SCALE 76 the Court held,

> "No decision relied upon by the appellants

> lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein."

40. Recently in Jalaram vs. State of Rajasthan reported in 2006 Cri.L.J. 528 the contention with respect to the non-explanation of the injuries on the person of the accused was raised. Considering the material on record the Apex Court found that it was a case of exceeding the right of private defence, thus, convicted the accused appellant of offence under Section 304(I) instead of 302 I.P.C.

41. **Upon a conspectus of the decisions of the Apex Court, we are of the view that it is a misnomer that ratio laid down in Mohar Rai's case(supra) does not hold good. The broad proposition laid down in the said case has been provided bounds by way of explanation given in three Judges Bench in Vijayee Singh's case(supra) and later on in Rajender Singh's case(supra). Thus, it emerges that in a case where the accused has sustained injuries grievous in nature, caused in the same course of occurrence and the prosecution fails to explain the injury, the Court is**

supposed to put itself on guard, and make an effort to search out the truth, how much the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful. Non-explanation of injuries assumes greater significance when the evidence consists of interested and partisan witnesses. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption much necessarily be raised that accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probablises the version of the private defence. Even if it is found to be a case of right of private defence, it is further required to be considered, if it was a case of exceeding the right of private defence.

42. Reverting to the question posed in Para 22 i.e. can it be said that the incident had exactly taken place in the manner the prosecution witnesses of the occurrence have deposed. We cannot lost sight of the most significant fact that A6 Nijawat Khan undoubtedly

received severe injuries during the same occurrence and the same have not been explained. Though the appellants have not taken a specific plea of right of self defence, it is well settled that such a plea cannot be ignored, if emerges from the material on record. Further, no decision is required to be cited for the proposition of law that the accused if acted in self defence need not prove beyond reasonable doubt and if two views are possible the accused is entitled to the benefit of doubt. Having regard to the severe nature of injuries on the person of A6 Nijawat Khan, we find it difficult to hold that the appellants acted only in the manner deposed by the witnesses of the occurrence. Undoubtedly there existed hostility between the appellants and the prosecution witnesses on account of the recent allotment of Muraba in the Canal Area of Hariar Minor. The defence version has come at the earliest by way of F.I.R. Case No.23/2000. The version finds corroboration from the medical evidence i.e. Severe injuries on the person of A6 Nijawat Khan. The prosecution did not produce the most material witness Chima Ram. However, he has been produced by the defence as D.W.1. He deposed that altercation took place between the parties in side the hut of deceased

Kumbha Ram in which the appellant A6 Nijawat Khan sustained severe injuries. He also deposed that immediately after the said incident he left the place and on return shortly thereafter, he found Kumbha Ram dead. It shows that the prosecution witnesses have suppressed the earlier part of the incident wherein A6 Nijawat Khan sustained severe injuries. It is significant to notice that all the eye-witnesses have stated in chorus that A1 Abdul Khan gave a lathi blow on the head of deceased Kumbha Ram as a result of which he fell down. After Kumbha Ram had fallen down all the appellants thrashed him by diverse weapons. This fact is falsified by the medical evidence. There are only three injuries on the person of the deceased. If all the accused persons would have given beating to the deceased Kumbha Ram in the manner alleged by the prosecution witnesses, there would have been more severe injuries on his person. This shows that the prosecution witnesses have not only exaggerated the incident but have also suppressed the genesis of the incident by not explaining injuries on the person of A6 Nijawat Khan. In these circumstances it is difficult to accept either of the versions. Thus, in the peculiar facts of the case, we consider it safe to hold that it is case of

free fight between the two parties. Having held that it is a case of free fight, application of Section 149 I.P.C. get excluded. Thus, only option left to us, is to examine the cases of the each appellants individually.

43. In order to better appreciate the individual case, it would be convenient to divide the occurrence in two parts. The first part in which A6 Nijawat Khan sustained severe injuries and second part in which Kumbha Ram was done to death and some of the prosecution witnesses sustained injuries.

44. As to the first part, keeping in view the fact that the incident of Nijawat Khan sustaining severe injuries was disclosed at the earliest, the non-explanation of injuries on his person, and the statement of most material witness D.W.1 Chima Ram, it is difficult to conceive that A6 Nijawat Khan participated in second part of the incident. Thus, A6 Nijawat Khan deserves to be acquitted of offence under Section 302/149 I.P.C. and all allied offences.

45. In fact the instant case being a case of free fight, appellants' conviction under Section 302 with the aid of

Section 149 I.P.C. is not sustainable. The deposition of the witnesses of the occurrence to the effect that after the deceased Kumbha Ram had fallen down, all the accused persons gave him beating by diverse weapons is falsified by the medical evidence. Thus, the conviction of all the accused persons for offence under Section 302/149 I.P.C. as well as all allied offences with the aid of Section 149 I.P.C. is not sustainable. Their conviction under Sections 148 and 447 I.P.C. is also not sustainable. However, they are liable for the individual role played by them in the occurrence.

46. To start with A1 Abdul Khan, there consistent evidence to the effect that he was carrying a lathi wrapped by wire. He gave the lathi below on the head of deceased Kumbha Ram. The statements find corroboration from the medical evidence. He himself has not denied his presence at the place of occurrence. However, he plead in his statement under Section 313 Cr.P.C. to the effect that on hearing the news of Nijawat Khan being assaulted by the prosecution witnesses, he rushed to the spot. The plea is probablised from the non-explained severe injuries on the person of A6 Nijawat Khan. But having regard to

the injury inflicted by him, he has definitely exceeded the right of private defence. His case is covered by Explanation (2) of Section 300 and thus offence is punishable under Section 304 Part I I.P.C.

47. Dealing with the case of other accused appellants, as far as A2 Motan Khan is concerned, P.W.2 Koja Ram has stated that he gave a lathi blow on his head and back. He also twisted his hand. The injury report Ex.P32 shows that Koja Ram sustained grievous injuries caused by blunt object. Thus, the trial court has rightly convicted him of offence under Section 325 I.P.C.

48. As regards A3 Ali Gawar, it is deposed by P.W.13 Mohini that Hanif and Ali Gawar assaulted her. The injury report Ex.P33 shows that she sustained two injuries both simple in nature caused by blunt object. Similarly, for A4 Hanif Khan, P.W.6 Santosh has stated that he inflicted injuries to her. Her injury report Ex.P31 shows that she sustained single injury simple in nature caused by blunt object. Thus, both the appellants A3 Ali Gawar and A4 Hanif Khan deserves to be convicted for offence under Section 323 I.P.C.

49. As far as A5 Vali Mohd., no role has been assigned by any of the prosecution witnesses. Thus, his conviction for any of the offence is not sustainable.

50. As regards A7 Beerbal Khan, it is submitted that his name does not find place in the First Information Report. It appears from the reading of the statements of different witnesses of the occurrence that A7 Beerbal Khan was the person, who was trying to get the dispute settled between the parties. No specific role has been assigned to him. Thus, we are of the view that he is entitled to be acquitted of all the charges levelled against him.

51. In view of above discussion, both the appeals are disposed of in the manner indicated below:-

(i) D.B.Criminal appeal No.931/2003 -Beerbal Khan vs. State of Raj. is allowed. The conviction and sentence of the appellant Beerbal Khan of offence under Section 302/149 I.P.C. and all allied offences is set aside. He is acquitted of all the charges levelled against him. He is on bail. His bail

bonds stand discharged.

(ii) D.B.Criminal Appeal No.895/2003 -Abdul Khan & Ors. vs. State of Raj. is partly allowed. The conviction of appellants Abdul Khan, Motan Khan, Ali Gawar, Hanif Khan, Vali Mohd. and Nijawat Khan for offence under Section 302/149 I.P.C. and sentence of imprisonment for life awarded to each appellant is set aside. They are acquitted of the said charges. Conviction of all the appellants for offence under Section 325/149 I.P.C. except A2 Motan Khan as well as under Section 148, 323/149 and 447 I.P.C. is set aside. They are acquitted of the charges levelled against them. Instead appellant A1 Abdul Khan is convicted of offence under Section 304 Part-I I.P.C. and sentenced to ten years rigorous imprisonment and to pay a fine of Rs.2000/-; in default of the payment to further undergo six months rigorous imprisonment. He is in Jail. He will serve out the remaining part of the sentence. The appellant A2 Motan Khan is convicted of

offence under Section 325 I.P.C. and awarded sentence to the period already undergone. He is on bail. His bail bonds stand discharged. The appellants A3 Ali Gawar and A4 Hanif Khan are convicted of offence under Section 323 I.P.C. and sentenced to imprisonment for the period already undergone. They are on bail. Their bail bonds stand discharged.

(MANAK MOHTA), J. **(N.N.MATHUR), J.**

BKS/-